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No. 88-339

In The
Supreme Court of the United States
October Term, 1988

JOHN H. STAMLER, RICHARD RODBART, EDMUND TUCKER and PATRICK MALONEY,

Petitioners,

vs.

JOHN N. ZAMBONI,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in concluding that speech by a lieutenant of detectives in which he contended that a reorganization plan instituted by his public employer violated civil service laws and regulations was speech of public concern.

2. Whether the court of appeals erred in concluding that a showing of actual disruption of the workplace caused directly by speech on matters of significant public concern may outweigh the employee's and society's First Amendment interests.

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UNITED STATES CONSTITUTION CITED:

First Amendment ..... *passim*

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this matter is the First Amendment to the United States Constitution which provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

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COUNTER-STATEMENT OF THE CASE

"Because of the *enormous variety of fact situations* in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged." *Pickering v. Board of Education,* 391 U.S. 563, 569, 88 S. Ct. 1731, 1735, 20 L. Ed. 2d 811 (1968), as cited in *Connick v. Myers,* 461 U.S. 138, 183 S. Ct. 1684, 75 L. Ed. 2d 708, 720 (1983) [Emphasis added]. Because this Court has so consistently reiterated the importance of making an independent examination of the factual situation in which each critical statement by a public employee occurs, *Rankin v. McPherson,* — U.S. —, 107 S. Ct. 2891, 2897, 97 L. Ed. 2d 315, 320 (1987), it is necessary to correct the many inaccuracies and misrepresentations contained in the one-sided presentation of the facts by petitioners.

The petitioners, while correctly identifying Zamboni as a Lieutenant of detectives in the Union County Prosecutor's Office, fail to advise the Court that Zamboni has been an employee in the Union County Prosecutor's Office since 1967. He progressed, by way of competitive civil

service examinations, from a position of investigator to that of detective in the classified service, to that of Sargeant of detectives, then to Lieutenant of detectives. He was promoted to Lieutenant by petitioner John Stamler in 1979. Lieutenant Zamboni has served for 21 years under four different prosecutors, with recognized distinction, receiving many and varied commendations. Prior to the occurrences which gave rise to this action, he had never received any sort of discipline, not even a verbal reprimand, from any superior under whom he worked.

THE REORGANIZATION PLAN

Zamboni's problems began in late 1982, when he opposed a major plan of reorganization of the investigative staff within the Union County Prosecutor's Office. By statute, county detectives in prosecutor offices throughout New Jersey are within the classified service subject to the well-established rules and regulations of the Civil Service Act. County investigators, on the other hand, serve in the unclassified service—at the pleasure of the prosecutor and "subject to removal by him" for any reason and at any time. Prior to the reorganization plan at issue, investigators had never been promoted to superior officer rank. *Zamboni v. Stamler, et al.*, 199 N.J. Super. 378, 380 (App. Div. 1985).

Petitioner Stamler announced in the fall of 1982 that he would consider promotion only from the unclassified investigative staff, and that any member of the classified staff seeking promotion would have to execute a leave of absence from the classified service. (Pa56); *Zamboni v. Stamler, supra* at 380. Stamler advised that he was dissatisfied with the civil service regulations and procedures

and preferred having a free hand in promoting and assigning investigative personnel without being compelled to utilize the promotional procedures established by civil service laws and regulations (Pa55-56). Stamler advised that for the duration of his tenure as the prosecutor of Union County, he would promote only those persons he saw fit to promote and would hold no competitive examinations for determination of who would be promoted. (Pa56); *Zamboni v. Stamler, supra* at 380. In effect, Stamler was eliminating civil service requirements governing promotions within the investigative staff and instituting in its place a patronage system whereby he could promote whomever he chose for whatever reasons.[1] (The local press considered the plan of sufficient public interest to report it). Petitioners' efforts to minimize the significance of this radical departure from established civil service rules governing promotions by referring to it as a "mundane", "ministerial", "minute" *personal decision* is disingenuous.

The plan was instituted in March 1983, and the prosecutor promoted 19 persons from the investigative staff into superior officer positions. The Appellate Division of the New Jersey Superior Court summarized this reorganization plan thusly:

> Under the reorganization plan, the prosecutor established superior officer positions within the unclassified service of the county investigators. The chain of command generally paralleled the hierarchial structure of the county detectives. Selected members of the detective staff were offered superior officer positions as investigators. Those detectives who accepted such

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[1] It is undisputed that in one instance, Stamler admitted promoting one person to Captain because the person was a "good sport".

> offers executed temporary leaves of absence from their classified positions. They retained the right to be reinstated to their former classified status at the expiration of their leaves of absence. The prosecutor also advised the detectives that he would not consider promotion within the classified ranks. *Hence the sole means of advancement under the prosecutor's reorganization was by way of accepting a supervisory or supervisor officer position in the unclassified service of investigators.* The articulated objective of the plan was to provide greater flexibility within the County Prosecutor's office. An auxillary purpose was to insure greater stability and an expertise in the traditional trial preparatory positions. [Emphasis added]

Zamboni, 199 N.J. Super. at 380 (cited in the Opinion of the District Court). (Pa31-32)

Even though he had expressed disapproval of the plan to Stamler, Zamboni sought promotion, contending that he felt pressured to do so since it was the sole means whereby he could hope to advance within the office. (Pa57). In this regard, he completed a questionnaire devised by petitioners and underwent an interview with Stamler. No examinations were given. He was not promoted.[2]

THE SPEECH AT ISSUE

Zamboni expressed his opposition to the reorganization plan and other concerns he had regarding the prosecutor's office in several ways. These expressions constitute the "critical speech" at issue.

1. *Private Conference With Prosecutor Stamler*

Around November 1982, and prior to the implementation of the reorganization plan within the Investigative

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[2] Of all superior officers for whom promotion was possible, only Zamboni was refused promotion.

Bureau, respondent had a lengthy, private conference with Stamler. (Although the court of appeals makes reference to this meeting (Pa4), petitioners have not mentioned it in their Petition). During this conference, which was held at Zamboni's instigation, Zamboni voiced his concerns that the reorganization plan as proposed by Stamler would virtually eliminate civil service in the office, that promotions would not be made according to merit and fitness, but, rather, according to the personal feelings of the prosecutor toward each applicant for promotion. During the same conference, the respondent openly criticized what he believed to be a failure by the prosecutor to aggressively prosecute in the areas of organized crime and political corruption. (Pa4); (Pa57). Zamboni contends that the retaliatory acts against him, especially the stripping of his supervisory responsibilities when he was moved to the trial unit, began after this conference.

2. *March 8, 1983 Letter To Civil Service*

On March 8, 1983, the plaintiff wrote to the Civil Service Commission protesting that the prosecutor was attempting to carry out his own appointment and promotion plan in contravention of the civil service rules and the New Jersey Constitution. (Pa55). He began his letter as follows:

> "I would like to bring to your attention a situation involving non-conformance to the duties and responsibilities relating to job classification as set forth by the Civil Service Commission, by the appointing authority of the Union County Prosecutor's Office."

Zamboni's March 8 letter, which was the first notice to civil service of what was happening, set forth in detail

the chronological history of the reorganization of the investigative staff by Stamler, and the procedures proposed by Stamler for making promotions. His description of the reorganization plan was essentially adopted by the Appellate Division in that portion of its decision in *Zamboni v. Stamler*, set forth above.

Although he did protest his transfer to the trial unit where superior officers had never been placed before and where he was stripped of supervisory functions required by his job title, Zamboni did not request that civil service intercede to promote him. While expressing opinions critical to Stamler in the letter, Zamboni never called Stamler a "liar", contrary to allegations of the petitioners on p. 29 of their Petition.

Zamboni summed up his letter by stating that the prosecutor was in violation of the New Jersey Constitution which provides essentially that appointments and promotions in civil service be made according to merit and fitness, to be determined by competitive examinations, as well as various civil service rules, specifically N.J.A.C. 4:1-6.3, 6.4, 6.5, 6.6, and 6.7. (Pa63-64). The letter was sent only to the Civil Service Commission, the appropriate agency for such complaints. The letter was not distributed within the office nor in any public forum. When petitioners learned of this letter, they brought charges against Zamboni seeking his demotion. After a departmental hearing to which Zamboni was entitled under the civil service law, the charges were dismissed.

3. *Letter to Prosecutor Stamler*

Zamboni wrote a letter to Prosecutor Stamler, dated March 21, 1983, in which he protested his transfer to the

trial unit where he would be working "outside of title". (Pa65). Zamboni also pointed out in this letter his contentions that there were violations of the New Jersey Constitution and of the rules which he had listed in his March 8 letter to Civil Service. (Pa67). He requested an assignment to a position commensurate with his duties as a Lieutenant of County Detectives. (Pa68). This letter was written to protest the retaliatory treatment Zamboni was receiving. Also, it was to protest an expressed goal of the reorganizational plan to enable the prosecutor, no longer under the restraints of the classified service, to move superior officers into positions "outside of title" where they had not previously been placed.

> "The articulated objective of the plan was to provide greater flexibility within the prosecutor's office. An auxiliary purpose was to insure greater stability and expertise in the traditional trial preparatory positions."

Zamboni v. Stamler, 199 N.J. Super. 378, 380 (App. Div. 1985).

4. *Lawsuit Against The Prosecutor And Prosecutor's Office*

On May 26, 1983, Zamboni filed an action in lieu of prerogative writ, pursuant to N.J.S.A. 11:25-1, in the Superior Court of New Jersey (Pa69),[3] alleging among other things that:

> 10. Said promotion plan as instituted and implemented by the defendants was arbitrary, unreasonable, discriminatory, oppressive, and unlawful in that:

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[3] Under New Jersey Civil Service Law, a claimant may proceed through administrative channels and by way of a court action simultaneously. Zamboni chose to do this.

> (a) Said promotion plan is in direct contravention to established Civil Service Rules and R gulations in that defendants have circumvented established guidelines for the promotion of individuals in the classified service. (Pa71).

The contention of petitioners that Zamboni sought judicial relief solely to rectify his personal circumstances (Pet. 7) is untrue. A full reading of this complaint shows clearly that the main thrust of the action was to have the reorganization plan adjudged unlawful, set aside, and to compel the defendants to institute and implement a promotion plan within the rules and regulations of the Civil Service Commission. (Pa72). He urged that the Court order defendants (petitioners) to cease compelling him to work outside his job title; however, Zamboni did not seek promotion as part of the relief. The press reported the filing of the suit.

Consolidated with Zamboni's action was an action raising identical issues brought by three detectives within the office—Richard J. Lazo, Nicholas Gallichio and Michael J. Hughes. Unlike Zamboni, neither of these three persons had sought promotion under the plan.

On March 6, 1984, the Law Division (Union County) of Superior Court of New Jersey, issued a decision reported as *Zamboni v. Stamler*, 194 N.J. Super. 598, 600 (Law Div. 1984). The Court observed, "[T]hese consolidated actions raise *significant issues* regarding the authority of county prosecutors to make appointments to positions of superior officers in the investigative staff in the unclassified service". [Emphasis added]. While concluding that Stamler had the authority to make promotions in accordance with

the plan, the Court nowhere suggested that the case was a mere "personnel dispute" between Zamboni and Stamler as petitioners urge.

On appeal, the Appellate Division of New Jersey Superior Court, affirmed, observing that ". . . the precise question presented here is of first impression". *Zamboni v. Stamler,* 199 N.J. Super. 378, 383 (App. Div. 1985). Neither did the Appellate Division suggest that the issues raised were nothing more than a mere "personnel dispute".

5. *August 19, 1983 Letter To Civil Service*

On August 19, 1983, Zamboni wrote to the Department of Civil Service, Division of Appellate Practices and Labor Relations, appealing from an unfavorable initial determination by Civil Service. (13a).[4] He set forth his legal and factual reasons for challenging the prosecutor's reorganization plan and stated, "I do not claim entitlement to receive an unclassified appointment . . . I do claim that the arbitrary and capricious manner in which this situation has been handled by the Prosecutor violates the basic tenents of Civil Service law and therefore, my rights as well". (17a); (Pa4). When petitioners received copies of this letter, they immediately brought another action to demote Zamboni. Zamboni, however, again defeated the action and the charges were dismissed.

The Civil Service Commission granted Zamboni a hearing stating, "[T]he record as presented raises serious con-

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[4] The petitioners fail to mention this communication in their Petition to this Court even though the court of appeals referred to it in its opinion. (Pa5).

cerns as to whether promotional appointments made to the Investigator title series were done to avoid Civil Service procedures, in violation of the rights of tenured employees". (21a)

In all of these communications, beginning with his early personal conference with Stamler, Zamboni challenged the constitutional and statutory validity of the prosecutor's reorganization plan. At no time did Zamboni seek as part of his relief that the prosecutor be compelled to promote him. He did, however, protest the transfer to the trial unit and the stripping of supervisory duties, as both part of the reorganization plan and as retaliation against him. Further, it is undisputed that during his lengthy service in the Union County Prosecutor's Office, Zamboni has been transferred many times. Although not always personally pleased with the transfer, Zamboni had never before protested it. Only when the transfer was in retaliation against him for opposing the reorganization plan and as an expressed part of the prosecutor's plan to disregard such things as "job titles" did Zamboni protest.

Although strongly protesting the transfer and the loss of supervisory duties that went with it, Zamboni accepted the transfer and continued to perform his duties in a satisfactory or better manner. Each of the three Performance Evaluations which Zamboni received between March 1983 and April 1985, while working in the trial unit, indicated that he either met or exceeded all standards. These Performance Evaluations prove that petitioners' contention on page 8 of their Petition to this Court that Zamboni's work performance had "deteriorated" is an intentional misrepresentation.

THE RETALIATORY ACTS

For purposes of their summary judgment motion, the petitioners have conceded that the disciplinary measures of which Zamboni complains not only occurred but were taken in reprisal for Zamboni's outspoken opposition to the reorganization plan. (Pa7); (Pa28). Despite this concession, petitioners, in an effort to denigrate their retaliatory acts, distort them in a particularly dishonest and misleading fashion in their Petition to this Court. (Pet. 8). The retaliatory acts set forth in Zamboni's Amended Complaint (1a-12a), *to which petitioners concede,* are described as follows:

a. Petitioners attempted to demote respondent on three separate occasions; (6a-7a)

b. Petitioners imposed upon Zamboni a fine of $100 for supposed "insubordination" when he declined to obey an order obviously designed to ridicule him; (7a)

c. Petitioners suspended Zamboni for allegedly failing to keep records properly—one year after the alleged dereliction—even though they knew he had not been responsible for the faulty record keeping; (7a)

d. Petitioners stripped Zamboni of all supervisory responsibilities which he had held previously; (8a)

e. Petitioners denied, and continue to deny, Zamboni any promotional opportunities despite his longevity and excellent record; (8a)

f. Petitioners kept Zamboni under constant surveillance and urged his co-workers to watch him and report any perceived infraction regardless of how minor; (7a-8a)

g. Petitioners held meetings of the investigative staff during office hours from which Zamboni was specifically excluded, telling the staff that Zamboni was attempting to take away their promotions and "take money out of your pockets"; (7a)

h. Petitioners encouraged Zamboni's co-workers to ostracize him and even ordered them not to take lunch or coffee breaks with him; (7a)

i. Petitioners telephoned respondent twice a day while he was out ill, sent a Captain to his home on several occasions to pick up notes from his doctor, and required him to submit to a physical examination before returning to duty, all actions never taken against anyone else; (6a)

j. Petitioner placed written reprimands within his file for such supposed derelictions as failing to say "Good Morning" to the prosecutor; allegedly failing to follow the "chain of command" by contacting the Prosecutor directly; for allegedly referring to the Prosecutor in a casual conversation as "your boss" rather than "our boss"; and for casually asking an assistant prosecutor about his case during office hours; (5a-6a)

k. Petitioners compelled the respondent to relinquish his service revolver because of his "attitude"; (8a)

l. Petitioners ordered respondent to submit to a psychiatric evaluation because of his "attitude". (8a)

The retaliatory actions by the petitioners against Zamboni were unrelenting. When not disciplining him in some way, they were requiring him to explain in detail and "in writing" any action by him that could open a way for

discipline. Petitioners, by their retaliatory actions, caused Zamboni to develop a painful and chronic spastic colon and psychological and emotional problems. His work which he loved and to which he was totally committed became an unbearable burden. He was cruelly isolated from long-time associates and friends.

Although the petitioners have never made a legal argument that respondent's damages are *de minimus*, unworthy of notice by the federal courts, the tone of their Petition dishonestly attempts to suggest that. In support of that effort, the petitioners deliberately misconstrue the district court's opinion dismissing respondent's complaint. They claim on page 9 of their Petition, "In a written opinion dated June 9, 1987, Honorable John Bissell, U.S.D.J. dismissed respondent's complaint and his central claim that such minor disciplinary actions were unconstitutional even if in retaliation for his letters and corollary state court lawsuit to invalidate the prosecutor's office reorganization 25a-54a." This sentence falsely implies that the district court's reason for dismissal of respondent's First Amendment action was because "such minor disciplinary actions" were not unconstitutional by virtue of the fact that they were too "minor". The district court did not make such a finding. Rather, its stated reason for dismissing the respondent's First Amendment claim was that the speech at issue was not of public concern. (Pa38).

Clearly, the petitioners were moving directly and inexorably toward removal of the respondent, if, in fact, he did not give up and resign beforehand. However, within twenty-four hours of receiving service of the Complaint in this action, the petitioners ceased their most egregious

retaliatory actions. The service revolver was returned; the order for the psychiatric evaluation was rescinded; respondent was transferred out of the trial unit and given supervisory duties; a pending disciplinary action was held in abeyance. For the most part, the petty written reprimands ceased. Zamboni has not been brought up on charges since filing his action; however, the retaliatory conduct continues nevertheless. The respondent has never been promoted; he is at the lowest end of the pay scale for a Lieutenant of detectives, even though he has the greatest seniority by far and a consistently excellent record; he is moved around from unit to unit without having an opportunity to establish any sort of continuity. He continues to be ostracized.

DISRUPTION IN THE WORKPLACE

Petitioners further distort the facts in this case by suggesting that Zamboni caused disruption in the workplace which they could not tolerate. There has been no evidence whatsoever adduced during the lengthy discovery conducted in this matter that Zamboni's speech was ever the cause of a single instance of disruption nor even of potential disruption.

If any disruption did, in fact, occur, it was entirely the result of actions by the petitioners, not by the respondent. The petitioners saw fit to spread among the office the fact that the respondent was challenging the reorganization and to rally the affected members of the investigative staff. They caused the dissemination to each and every member

of the investigative staff of a letter directed to the respondent from the Department of Civil Service generally adverse to the respondent's appeal. They held meetings during working hours of all members of the investigative staff, specifically excluding respondent and the detectives, who had also brought a lawsuit challenging the plan, for the purpose of discussing the litigation which the respondent had brought. They ordered co-employees not to associate with respondent. The prosecutor took the two highest ranking assistant prosecutors in the trial unit away from the duties of investigating and prosecuting criminals for which they were hired, and, instead of utilizing the services of the county counsel, gave them the considerable responsibility of defending the legal action brought by Zamboni.

The time and manpower spent by the petitioners, all high-ranking officials in the prosecutor's office, in issuing the memos, reprimands, and demands for explanations over incredibly petty matters, preparing the disciplinary actions, prosecuting disciplinary actions, calling respondent's home when he was ill, releasing a Captain of investigators to hand-deliver letters to the respondent must have caused some disruption in the petitioners' normal and usual duties and responsibilities. Zamboni, on the other hand, never held meetings, never circulated questionnaires nor petitions, nor otherwise solicited support from his co-employees for his on-going challenge to the reorganization plan.[5] Rather, Zamboni continued to perform his duties in a com-

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[5] Contrary to petitioners' allegations in their Petition, (Pet. 5), Zamboni did not "voice publicly his dissatisfaction with the reorganization and his consequent failure to be promoted" . . . to his co-workers.

petent manner, receiving good evaluations throughout the course of the litigation.

Zamboni avoided making any comments to the press even though he had been approached on several occasions during the pendency of his litigation. By contrast, the press printed statements by petitioner Rodbart negative to Zamboni claiming that Zamboni had brought the litigation only out of "sour grapes" for not having been promoted.

Respondent, therefore, submits that, based on the facts of this case, the decision of the court of appeals was correct and in full accordance with the standards established by this Court governing the constitutional protections to be accorded speech by public employees.

Accordingly, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I

THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN ACCORDANCE WITH THIS COURT'S HOLDINGS IN CONNICK V. MYERS AND OTHER CASES ADDRESSING A PUBLIC EMPLOYEE'S FIRST AMENDMENT RIGHTS TO SPEAK ON ISSUES OF PUBLIC CONCERN.

The petitioners urge this Court to grant the requested writ of certiorari because they contend that the court of

appeals, in finding that John Zamboni's speech was of public concern departed "radically" from this Court's holding in *Connick v. Myers*, 461 U.S. 138, 183 S. Ct. 1684, 75 L.Ed. 2d 708 (1983). To the contrary, it is petitioners who "radically" misinterpret *Connick*, not the court of appeals. Petitioners rightly contend that the "analytical touchstone" for this case is *Connick v. Myers*, which describes the appropriate test for determining when constitutional protection is to be afforded to a public employee's speech:

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 720.

However, petitioners, while recognizing the importance of this test, seriously and deliberately[6] misquote this section of *Connick*. They state, "When a public employee speaks not as a citizen upon matters *only* of public concern, but instead as an employee upon matters only of personal interest . . ." (Pet. 13). This *only* does not exist in the Supreme Court's opinion. As quoted by petitioners, this misplaced *only* distorts and improperly restricts the import of the Supreme Court's pronouncement on a public

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[6] Petitioners have consistently misquoted this section of *Connick* throughout the history of this matter--in their brief in support of their Motion for Summary Judgment at the district court level, in their responding brief to the appeal to the Third Circuit, and now in their Petition for Certiorari. They have adhered to this erroneous reading of *Connick* despite having the error repeatedly pointed out by respondent.

employee's speech. This Court in *Connick* intended speech only of *personal concern* to be outside the protection of the First Amendment. It never intended that a public employee's speech be solely (only) of *public concern* before triggering First Amendment protection. No doubt petitioners' misreading of *Connick* has erroneously led them to believe the court of appeals has erred in its decision.

"*Connick* does not require every word of communication to be of interest to the public", *Anderson v. Central Point School Dist. # 6*, 746 F.2d 505, 507 (9th Cir. 1984). Indeed, had this Court intended that an employee's speech be *only* of public concern before it can be afforded constitutional protection, it would not have isolated the one question on Myers' questionnaire which did, in fact, touch upon a matter of public concern. Specifically, this court found that Question 11, which inquired if assistant district attorneys ever felt pressured to work in political campaigns on behalf of office-supported candidates, was sufficient to invoke the *Pickering* balancing test. However, on balance, it was outweighed by the disruption within the offices which Myers, with her questionnaire, had caused and which her employer had a right to prevent. Doubtless, Myers would have been protected by the First Amendment had she not caused intolerable disruption in the workplace with her questionnaire. *Pickering v. Board of Education*, 391 U.S. 563, 572-73, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

The court of appeals in *Rode v. Dellarciprete*, 844 F2d 1195 (3rd Cir. 1988), a case found by the court to be similar to the present one, correctly noted that motivation of the public employee in speaking, while a factor to be considered, was not dispositive. (Pa10).

> "In *Connick*, the employee was unhappy with her proposed transfer and it was this unhappiness which motivated her distribution of a questionnaire to fellow employees. However, this factor was not determinative in deciding whether the employee's speech concerned matters of public interest. The [Supreme] Court focused particularly upon the content of the employee's speech, finding that, for the most part, it concerned internal employment practices that had no public interest character. [*Connick*, at 148-49] Notwithstanding her motivation, the [Supreme] Court found that one question in the questionnaire, concerning pressure to participate in political campaigns, did touch upon a matter of public concern. [*Connick*, at 149].

Rode, 845 F2d at 1201.

The court of appeals correctly analogized the present case with the situation in *Rode* and *Connick*, holding that if, as petitioners urged, motivation rather than content is dispositive, "the [Supreme] Court would have had no reason to isolate the one question that was of public concern from all the others". (Pa11).

Indeed, it is a rare employee who could be described as altruistic or completely disinterested, yet willing to incur the wrath and reprisals of a public employer by speaking out in a manner critical of the public employer. Evidently, however, the three county detectives who brought the lawsuit against Stamler which was later consolidated with that brought by Zamboni challenging the prosecutor's reorganization plan were such employees. None had an axe to grind or "quintessential beef" with the petitioners since none had requested a promotion. *Zamboni v. Stamler*, 194 N.J. Super 590, 602-603 (Law

Div. 1984). Accordingly, if the district court were correct in turning its decision on a determination of the *primary motivation* of the employee, an incongruous result would obtain whereby the speech of Detectives Lazo, Hughes and Galicchio would be protected while that of Zamboni would not—even though all raised the same issues.

Other circuits have repeatedly found, as has the Third Circuit, (*Trotman v. Bd. of Trustees of Lincoln University,* 35 F2d 216 (3rd Cir. 1980); *Johnson v. Lincoln University of Commonwealth,* 776 F2d 443 (3rd Cir. 1985); *Rode v. Dellarciprete, supra*), that the fact that the employee has a personal stake in the speech at issue is not determinative in the analysis of whether or not the speech is of public concern. *See, McKinley v. City of Eloy,* 705 F2d 110, 114 (9th Cir. 1982), (provisional policeman's speech dealing with the rate of compensation for members of the city's police force found to be of public concern since it raised the issue of the competency of the police force); *Bowen v. Watkins,* 669 F2d 979 (5th Cir. 1982), (speech by two employees, denied a promotion pointing out that the person who had been promoted had been guilty of certain irregular activities making him unfit for the promotion found to be of public concern); *Daulton v. Affeldt,* 678 F2d 487 (4th Cir. 1982), (speech by a college teacher dealing with the administration's treatment of students and the community and with the mishandling of personal maternity leave request and assignment of a duty she felt ill-prepared to do of public concern); *Knapp v. Whitaker,* 757 F2d 827, 842 (7th Cir. 1985), (although a teacher was personally affected by inequitable mileage allowances for different athletic coaches

and the ineffectiveness of the grievance procedure, his speech "informed the Peoria community of the possible shortcomings in the management policies of the school district" and, was therefore, of public concern).

The court of appeals is likewise correct in concluding "that public employees' criticism of the internal operations of their places of public employment is a matter of public concern". (Pa9). Employees are the persons most likely "to have informed and definite opinions" as to how a government agency is being run. *Pickering v. Bd. of Education,* 391 U.S. 563, 572, 88 S. Ct. 1731, 1741, 20 L. Ed. 2d 811, 819 (1968). Speech opposing bad management of a government office is no less of public concern because the speaker may be a victim of the bad management. In fact, it is reasonable that employees are more readily prompted to speak on issues of public concern when they, themselves, have been adversely affected by the actions which are complained of.

In the present case, the appeals court correctly found that Zamboni's speech ". . . raised significant issues concerning, *inter alia,* whether the county prosecutor had impermissably circumvented the civil service laws, the role of civil service employees in the county prosecutor's office, and the manner in which the county prosecutor . . . performed his administrative functions". (Pa9).

Zamboni expressed broad and important concerns for the preservation of the civil service laws and the basic requirement that appointments and promotions within the civil service be made on the basis of fitness and merit. This speech is core speech clearly warranting First Amendment protection, ". . . there is a demonstrated in-

terest in this country that government service should depend upon meritorious performance rather than political service". *Connick, supra,* at p. 169. The fact that these significant issues of public concern also touched Zamboni as an individual in no way detracts from their public interest aspect.

The decision of the court of appeals is in full accordance with *Connick v. Myers,* and other decisions of this Court governing speech by public employees. *See, Pickering v. Bd. of Education, supra; Branti v. Finkel,* 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); *Givhan v. Western Line Consolidated School District,* 439 U.S. 419, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Perry v. Sinderman,* 407 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Rankin v. McPherson, supra.*

The requested writ for certiorari should be denied.

II

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS ARTICULATED THE CORRECT LEGAL STANDARD FOR DETERMINING WHETHER ZAMBONI'S SPEECH CAUSED ANY DISRUPTION IN THE WORKPLACE THAT MAY OUTWEIGH ZAMBONI'S AND SOCIETY'S FIRST AMENDMENT INTERESTS.

Petitioners, unable to point to a single instance of disruption, caused by Zamboni's speech, have argued that the speech (a private conversation with Stamler; letters of appeal to the Civil Service Commission in March and

August 1983; a letter to Stamler in March 1983; and a state lawsuit) possessed an impermissible *potential* for disruption justifying their retaliatory actions. The court of appeals correctly rejected this argument and held that a finding of *potential* disruption in the workplace would be insufficient to outweigh Zamboni's First Amendment interests. (Pa12).

The standard established by the court of appeals to be followed on the ordered remand of the matter, ". . . in cases such as this involving speech on matters of *significant* public concern, a showing of actual disruption is required", [emphasis in original] (Pa12), is well within the dictates of *Connick*.

Under the particular set of facts presented in *Connick*, "manifest disruption of the office and destruction of working relationships" was not required before action by the employer could be taken. However, petitioners ignore the caution by this Court, ". . . that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern". *Id.* at 1692-93. Taken as a whole, the public concern raised in Myers' speech was minimal at best. Zamboni's speech, on the otherhand, substantially raised issues of *significant* public concern.

There are other important factual differences between *Connick* and the present case which petitioners ignore. In *Connick*, Myers prepared and distributed her questionnaire at the office. This not only required Myers to leave her work but for others to do the same in order to complete the questionnaire. Clearly, Myers' questions were designed to rally co-workers in support of her posi-

tion and against Connick in the personal on-going dispute she had with him. Both Connick and his first assistant characterized Myers' actions as causing a "mini-insurrection". This Court recognized that it would have been unreasonable to have expected Connick to wait until the "mini-insurrection" spiraled into something even more disruptive and destructive.

By contrast, Zamboni spoke privately with Stamler about his concerns without involving any other persons in the office; he wrote his March and August letters of appeal directly to the Department of Civil Service—as he had a statutory right to do under applicable civil service laws; he did not make his appeal letters public to other members of the staff; he certainly made no effort to rally their support in favor of his position; he did not air his concerns publicly with the press. While it is undisputed that Zamboni's March 8, 1983 letter to the Department of Civil Service contained words of criticism of Stamler, they caused no disruption nor interference with the orderly functioning of the office. In fact, if anyone other than the Civil Service official to whom the letter was addressed and Stamler knew of the criticism, it was by way of the petitioners who eagerly spread throughout the office information of Zamboni's opposition.[7]

Petitioners erroneously urge that there is no room within the First Amendment for such criticisms of a public employer. *Rankin v. McPherson*, 107 S. Ct. 2898, disposes of this contention; "The inappropriate or controversial character of a statement is irrelevant to the ques-

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[7] Stamler claimed that he did not even learn of the March 8 letter until approximately August 1983.

tion whether it deals with a matter of public concern''. This Court has consistently held that *vehement, caustic,* and sometimes *unpleasantly sharp* attacks on government and public officials are within the First Amendment where public issues are debated. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1960).

In no way can it be said that Zamboni's speech interfered with ''the effective functioning of the public employer's enterprise'', that would justify the retaliation taken against him. *Rankin,* 107 S. Ct. at 2898-99. Nor can it be claimed that Zamboni's position in the hierarchy of the prosecutor's office requires that degree of personal loyalty and confidence necessary to its proper functioning, *Sprague v. Fitzpatrick,* 546 F2d 360 (3rd Cir. 1976). Zamboni is relatively far removed from the prosecutor in the chain-of-command within the prosecutor's office. He did not have access to the prosecutor, and, in fact, was reprimanded for once writing a memo directly to the prosecutor. His job was and remains one with ''limited and well defined objectives'' with no policy making responsibilities, as opposed to a "confidential" employee who holds ''a job which requires formulation and implementation of broad plans''. *Walter v. Botti,* 570 F. Supp. 542, 545 (D.N.J. 1983).

Petitioners erroneously contend that *Sprague v. Fitzpatrick, supra,* requires a holding that Zamboni's role in the prosecutor's office would prohibit his critical speech. ''Why the court of appeals failed to hold a lieutenant of detectives in Prosecutor Stamler's office to a similarly exacting standard [as that to which Sprague was held], is baffling''. (Pet. 27) In reviewing the contrast be-

tween Zamboni's position and that held by Sprague it is "baffling" that petitioners claim they are comparable. Sprague served as the first assistant district attorney under Fitzpatrick. The court held that the first assistant is the district attorney's "alter ego". *Id.* at 562. Among the first assistant's responsibilities were assisting the district attorney in formulating policy, performing administrative duties on a daily basis, keeping the district attorney informed about the performance of the various units, and acting in the district attorney's place when the latter was unavailable. Zamboni did not even have direct access to the Prosecutor, much less serve as his "alter ego". Sprague "impugned the integrity" of the district attorney in the press, dealing an obviously mortal blow to the needed confidential relationship. Zamboni never enjoyed a similar confidential relationship with Stamler, nor did he ever impugn Stamler's integrity in public.

The anger of the petitioners toward the respondent for what they perceive as an act of disloyalty in breaking rank does not make Zamboni's position one of "confidential" employee. Nor can the petitioners claim a vague need for respect and discipline merely because the employer is the law enforcement agency for the county. ". . . [T]he need for discipline as an abstract concern should not be allowed to overshadow individual interests in free speech, unless the department's true interest in suppressing the speech in this regard can be isolated and verified". *Eiland v. City of Montgomery,* 797 F2d 953 (11th Cir. 1986), *rehearing and hearing en banc denied,* 803 F2d 1185, *cert. den'd.* 107 S. Ct. 3263 (1987). A law enforcement agency cannot arbitrarily dispatch with the

United States Constitution even if viewed as "para-military" as petitioners claim.

The petitioners no doubt felt internal unease and unpleasantness when Zamboni broke rank and brought his challenges to a radical plan which they hoped to implement without complaints, much less a lawsuit. This does not, however, convert Zamboni's speech into that degree of disruption that would necessarily outweigh his rights to free speech. *See, Monsanto v. Quinn,* 674 F2d 990, 1001 (3rd Cir. 1982).

There would be no First Amendment protection of critical speech by public employees if public employers were free to justify their retaliatory acts by claiming some vague, undefined fear of "potential" disruption. Neither *Connick,* nor any other case decided by this Court intended such a result.

In conclusion, respondent spoke of significant matters of public concern and interest. He did so by the legal avenues open to him in the most responsible and professional way in order to avoid disruption and/or embarassment to his employer. The court of appeals correctly identified the legal standard to be followed before Zamboni's rights to speak are balanced against the employer's interests in the proper functioning of the office.

It is respectfully requested that this Court deny the writ of certiorari.

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CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that the Court deny the requested writ of certiorari.

Respectfully submitted,

PATRICIA BREUNINGER, ESQ.
BREUNINGER, HANSEN & CASALE
Attorneys for Respondent

Dated:

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-1748
Honorable John W. Bissell

JOHN N. ZAMBONI, Plaintiff, vs. JOHN H. STAMLER, Prosecutor of Union County, & Indiv.; PATRICK J. MALONEY, Chief of Investigations for the Union County Prosecutor's Office & Indiv.; RICHARD P. RODBART, Supervisor for the Union County Prosecutor's Office & Indiv.; EDMUND J. TUCKER, First Assistant Prosecutor of Union County & Indiv.; COUNTY OF UNION, UNION COUNTY PROSECUTOR'S OFFICE, Defendants.	AMENDED VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

I. PRELIMINARY STATEMENT

1. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments, and under the New Jersey State Constitution, Article One, Section G, and under the laws of the United States, particularly 42 U.S.C. § 1983, § 1985, & § 1988 which provide for remedies in Federal Court to redress the deprivation of the Plaintiff's rights to freedom of speech and due process of law.

This action also alleges a pendant state claim of intentional infliction of emotional distress under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

2. Specifically, Plaintiff complains that the Defendants, acting in concert and individually and under color of state law, custom, or usage, have intentionally, willfully, wantonly and maliciously engaged and continue to engage in the patterns and practices which have deprived the Plaintiff of his rights to the free exercise of speech, association and due process by, among other things, harassing him in his employment, wrongfully suspending him without pay and an opportunity to be heard, depriving him of promotional opportunities, threatening the loss of his reputation and status as a law enforcement officer, and threatening the loss of his job.

Plaintiff contends that the adverse actions taken against him by the Defendants, acting individually and in concert, are the direct retaliation and retribution for his having exercised his rights to freedom of speech and association. The Plaintiff alleges that the Defendants have taken similar adverse actions against others who have likewise exercised their rights to freedom of speech and association and that they maintain a general policy designed to violate and restrict the exercise of First Amendment Rights.

The Plaintiff seeks injunctive relief, compensatory damages, punitive damages, and counsel fees and costs of suit.

II. JURISDICTION

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1131, 1343, 2201 & 2202. The matter in con-

troversy exceeds in value, exclusive of interest and costs, the sum of $10,000.00.

III. PARTIES

PLAINTIFF

4. JOHN N. ZAMBONI, residing at 15 Coldevin Road, Clark, Union County, New Jersey, is and was at all times mentioned herein a Lieutenant of Detectives in the Detective Bureau of the Union County Prosecutor's Office.

DEFENDANTS

5. JOHN H. STAMLER, is and was at all times mentioned herein the Prosecutor of Union County, maintaining offices in the Union County Administration Building, Elizabeth, New Jersey, and as such is the senior official responsible for the administration of the Union County Prosecutor's Office, including supervision of all employees in the Prosecutor's Office. [Hereinafter referred to as the "Prosecutor"].

6. EDMUND J. TUCKER, is and was at all times mentioned herein, the First Assistant Prosecutor of Union County, maintaining offices in the Union County Administration Building, Elizabeth, New Jersey, and, among other duties, assists the Prosecutor in the general administration of the Prosecutor's Office, including supervision of all employees in the Office.

7. PATRICK J. MALONEY is and was at all times mentioned herein the Chief of Investigations for the Union County Prosecutor's Office, with offices in the Union County Administration Building, Elizabeth, New Jersey,

and is the official responsible for supervising all investigations within the Prosecutor's Office and those employees, such as Plaintiff, who serve as detectives and/or investigators.

8. RICHARD P. RODBART is and was at all times mentioned herein an Assistant Prosecutor in Union County, maintaining offices at the Union County Administration Building, Elizabeth, New Jersey, who holds the title of Trial Supervisor, and as such is responsible for the administration of all trials conducted by the Office of the Prosecutor and is responsible, among other things, for the supervision of all personnel such as the Plaintiff who are assigned to the Trial Unit of the Prosecutor's Office.

9. UNION COUNTY is a body politic with general offices located in the Union County Administration Building, Elizabeth, New Jersey, and is charged with the duty of supervising, controlling, and otherwise, governing the affairs of the County, its agents, servants and employees, including the Prosecutor and employees of the Prosecutor's Office.

10. UNION COUNTY PROSECUTOR'S OFFICE maintains general offices located in the Union County Administration building, Elizabeth, New Jersey, and is charged with the duty, among others, of supervising the agents, servants and employees of the Prosecutor's Office.

IV. STATEMENT OF FACTS

11. The Plaintiff was employed by Defendant UNION COUNTY in January 1967, as an investigator in the office of the Union County Prosecutor. He became a

detective with Civil Service classification in 1973. At the present time, he holds the rank of Lieutenant Detective in the Detective Bureau of the Prosecutor's office.

12. For the first sixteen (16) years of his employment, until the events which underline this action occurred, the Plaintiff enjoyed an exemplary work record with several promotions and regular increases in pay. He was also the recipient of numerous commendations for excellent service in both investigatory and supervisory areas in which he performed.

13. Beginning on or about November 1982, the Prosecutor instituted a reorganization plan involving the detectives and investigators working in the Union County Prosecutor's office. The Plaintiff, along with the other detectives in the department, believing that the plan violated their rights under Civil Service laws, actively opposed the Prosecutor's reorganization plan. After protests to Civil Service failed, the Plaintiff filed a lawsuit in the spring of 1983 against the Prosecutor seeking to hold the reorganization plan invalid.

14. Immediately following the opposition expressed by the Plaintiff to the Prosecutor's reorganization plan, the Defendants, acting in concert and individually, began a pattern of harassment, coercion and intimidation against the Plaintiff which continues to the present and which has served to threaten his employment and adversely affect his emotional and physical well-being.

15. The Plaintiff has been subjected to a series of verbal and written reprimands for minor, petty, and, in many instances, untrue allegations of misconduct. Illustrative of the reprimands are:

(a) A written reprimand critical to the Plaintiff's "demeanor" for the Plaintiff's alleged failure to say "Good Morning" to the Prosecutor;

(b) A written reprimand accusing the Plaintiff of "conducting private business while on duty" because of a casual conversation between the Plaintiff and an Assistant Prosecutor in which the Plaintiff expressed concern regarding his pending lawsuit and the effect it was having on his family and his position in the office;

(c) A written reprimand accusing the Plaintiff of a "lack of cooperative spirit" for sending a memorandum directly to the Prosecutor, thus allegedly failing to "follow the chain of command";

(d) A written reprimand critical of the Plaintiff's "attitude" for his having allegedly referred to the Prosecutor in a casual conversation with an Assistant Prosecutor as "your boss" rather than "our boss".

16. During March and April 1983, while the Plaintiff was out on sick leave due to illness, upon the direct orders of the Prosecutor, he was telephoned at his residence twice each day. Additionally, he was hand-delivered various letters from the Prosecutor demanding notes from his physician. The pressures on the Plaintiff caused by this unjustified harassment greatly exacerbated the Plaintiff's illness.

17. The Defendants sought the Plaintiff's demotion in formal charges brought against him during the summer of 1983. He was accused of misusing public property for having used the Union County Prosecutor's office station-

ary to write two letters to Civil Service protesting the Prosecutor's reorganization plan.

18. In April 1984, the Plaintiff received a four-day suspension without pay for allegedly having failed more than a year earlier to keep records properly. This suspension was imposed even though the Defendants had direct knowledge that the Plaintiff was not responsible for the alleged improper record keeping. Plaintiff's efforts to file a grievance for the manner in which this suspension had been imposed was disregarded by the Defendants. Plaintiff was denied a hearing on the charges.

19. The Defendants have attempted to isolate the Plaintiff and encourage his ostracism by his co-workers. Illustrative of their efforts are:

(a) They held regular meetings during office hours of the office staff to discuss the pending litigation which the Plaintiff had brought, specifically and openly excluding the Plaintiff and other detectives who had joined in the legal action;

(b) When the Plaintiff received a letter from the Civil Service Commission adverse to his position in the dispute, the Prosecutor had sufficient copies made of the letter so that each employee in the office would receive one. The Plaintiff was ordered to accept a copy of the letter, even though it had been addressed to him in the first place, and to sign a notice of his receipt. When he refused to do so, the Defendants brought formal charges against him alleging "insubordination" and seeking his demotion;

(c) Assistant Prosecutors with whom the Plaintiff worked in the Trial Unit were instructed by the Defen-

dants to keep the Plaintiff under constant surveillance and to "write him up" for any observed infraction regardless of how minor.

20. When another detective, one Richard Mason, who had also opposed the Prosecutor's reorganization of the office and who was terminated by the Prosecutor, appealed his termination, the Plaintiff and all members of the Detective Bureau were ordered by Defendant Maloney, under threat of disciplinary action, to report all oral or written contact they had had with Detective Mason or his attorney. When Plaintiff obeyed this order, he was questioned extensively on the subject.

21. As a direct result of having taken issue with the Prosecutor's reorganization plan and having brought a civil action to challenge it, the Plaintiff has been stripped of all supervisory responsibilities which, in line with his rank, he had had prior to the retaliatory actions by the Defendants. He has additionally been denied any promotional opportunities.

22. In March 1985, the Plaintiff was ordered by Defendant Maloney to turn in his service revolver because of alleged problems in his "attitude". Additionally, he has been threatened with having to submit to a psychiatric evaluation in the future. Despite his specific request, no reasons for these actions against him have been given to him other than that the Prosecutor was displeased with his "attitude".

23. The Plaintiff has received vague threats by Defendant Maloney of future disciplinary actions allegedly for comments made to Defendant Rodbart which displeased the Defendants.

24. The Plaintiff has continued to satisfactorily perform his duties in the Union County Prosecutor's office despite the constant harassment, disciplinary actions, threats, coercion, and other adverse actions taken against him by the Defendants. However, the actions by the Defendants, acting under color of law in violation of the Plaintiff's civil rights, have seriously interferred with his emotional and physical well-being, having cast a grave shadow over his reputation and status as a law enforcement officer and have made his future employment with Union County extremely tenuous. These actions by the Defendants constitute a malicious, willful and wanton disregard for the rights of the Plaintiff.

25. By their intentional and wrongful actions set forth in this Amended Complaint, along with their stated policies restricting the rights of the Plaintiff and other employees to freedom of speech and association, the Defendants have placed an impermissible chili on the free exercise of the civil rights of the Plaintiff and those employees of the Union County Prosecutor's office affected by the policies.

V. FIRST CLAIM OF RELIEF

26. The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the Constitution, and Article I, Section G of the New Jersey Constitution guarantee the rights to freedom of expression and association.

27. The Defendants have violated Plaintiff's rights to freedom of expression and association by punishing him for exercising them by, among other things, harassing him,

intimidating him, and otherwise, taking adverse actions against him, and chilling his free exercise of these rights in the future by threatening adverse actions against him.

28. Defendants have established, maintained and enforced policies within the Union County Prosecutor's office which severely restrict employees of the Union County Prosecutor's office in the free exercise of their First Amendment rights to freedom of speech and association, which policies are unconstitutional.

IV. SECOND CLAIM FOR RELIEF

29. The Fourteenth Amendment of the United States Constitution provides in pertinent part that no citizen may be deprived of life, liberty or property without due process of law. The actions of the Defendants, acting individually and/or in concert under the color of law in harassing, intimidating, coercing, and otherwise, punishing and threatening the Plaintiff without good cause and based on false, scandalous and fraudulent allegations have served to deprive him of his rights guaranteed by the Fourteenth Amendment to the United States Constitution.

V. THIRD CLAIM FOR RELIEF

30. The adverse actions taken by the Defendants against the Plaintiff were in direct retaliation for his having exercised his statutory right under N.J.S.A. 11:1-1 et seq., the New Jersey Civil Service Law, to appeal violations of that law to the Civil Service Commission and by summary proceedings in New Jersey Superior Court. Such retaliation is contrary to the purposes and intent of

the Civil Service Law and is against public policy of the State of New Jersey.

VI. FOURTH CLAIM FOR RELIEF

31. The New Jersey Tort Claims Act, N.J.S.A. 59: 1-1 et seq., provides for a remedy for the negligence and intentional torts committed by public entities and their agents, servants and employees.

The Defendants, by their actions, have intentionally, maliciously, willfully, and in reckless disregard of the Plaintiff's rights, inflicted severe mental and emotional distress upon him, causing him to experience severe injuries, both mental and physical.

VII. PRAYER FOR RELIEF

THEREFORE, the Plaintiff prays that this Court:

A. Declare that through the individual and collective effects of their acts and practices, the Defendants have violated rights secured to the Plaintiff by the United States Constitution and by the New Jersey Constitution.

B. Declare that the stated policy of the Union County Prosecutor's office restricting freedom of speech and association of its employees is an unconstitutional infringement on the rights of the employees to freedom of speech and association which is guaranteed by the United States Constitution and the New Jersey Constitution.

C. Preliminarily and permanently enjoin the Defendants from engaging in such illegal practices and patterns as set forth in the Amended Complaint and from enforcing its illegal policies.

D. Award compensation to the Plaintiff for injuries, humiliation, and deprivation suffered as a result of the Defendants' actions.

E. Award Plaintiff punitive damages against the individual Defendants.

F. Award Plaintiff such other and further relief as the Court may deem to be just and equitable, including reasonable attorney fees, costs and disbursements.

RESPECTFULLY SUBMITTED,

/s/ Patricial Breuninger
PATRICIA BREUNINGER, ESQ.
Breuninger, Hansen & Casale
310 Park Avenue - Box 280
Scotch Plains, New Jersey 07076
Attorneys for Plaintiff

Dated: January 16, 1986

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury as to all issues.

/s/ Patricial Breuninger
PATRICIA BREUNINGER, ESQ.
Attorney for Plaintiff

Dated: January 16, 1986

OFFICE OF THE PROSECUTOR
COUNTY OF UNION, NEW JERSEY

August 19, 1983

Mr. Peter J. Calderone, Director
Division of Appellate Practices
and Labor Relations
Department of Civil Service
CN 312
Trenton, New Jersey 08625

Dear Mr. Calderone,

In accordance with Civil Service appeal procedures, please consider this letter as my formal appeal of the initial determination rendered by Morris C. Ianni, Director of County and Municipal Government Services in response to a letter of complaint, dated March 8, 1983, that I had forwarded to Eugene J. McCaffrey, Sr., President of the Civil Service Commission in protest of a recent reorganization of the Union County Prosecutor's Office. (Enclosed, is a copy of the aforementioned 3/8/83 letter and a copy of Mr. Ianni's letter dated 8/9/83.)

This appeal is based on exceptions that I take of the conclusions reached in Mr. Ianni's determination, and includes, but is not limited to, the following:—(on a point by point basis predicated by the composition of Mr. Ianni's letter):

1) Mr. Ianni's determination makes no mention of the circumstances under which superior officers were requested by the Prosecutor to accept appointment in the unclassified service. I take issue with the manner in which the offer was made (refer to my letter dated 3/8/83, and Prosecutor

Stamler's memo dated 11/16/82, which are appended hereto). Where is this action consistent with Civil Service Rules and Regulations? Did Civil Service investigate and approve said actions as provided for in Title 11?

I think that any prudent and reasonable person who reads the full court decisions reached in Cetrulo v Byrne and Rolleri v Lordi, would agree that the issues raised have no bearing on the circumstances involved in my complaint. Indeed, the decision of the court in Rolleri v Lordi, in particular, reflects the tenuous position of an investigator, with a clear indication of the limitations of said position. I quote, in part, from said decision:

County Prosecutors must be given broad powers to appoint his own personnel, and although the powers and rights of both county detectives and county investigators are identical, clear legislative purpose and plan in providing for investigators, excluded from the classified service of Civil Service, was to afford county prosecutors a confidential investigatory staff serving at his pleasure and removable at his will, and holders of his two positions are not "*fungible.*"

Also—Excerpts from Title 11

Indeed, it is the purpose of Civil Service legislation to put positions in classified service beyond political control and exercise of partisanship and personal favoritism; underlying motivation is to obtain in public interest an efficient public service based on merit appointment, and guarantee of tenure in office and protection against groundless demotions and reductions are important inducements to attract qualified personnel into public service.

The purpose of the Civil Service law was to procure efficient public service by public officers, and

it should be given a liberal construction within its operation. Devlin v McDermott, 84 N.J.L. Design of Civil Service legislation was to secure tenure during good behavior for those employees who come within its scope, and to give protection against dismissal to those holding positions/and other types of discrimination, which legislature placed in classified service, Scancarella v Department of Civil Service, 24 N.J. SUPER 65, 92A20637 (1953) 403, 86 A 500 (1913). Sullivan v McOsker, 24 N.J.L. 380, 66 A 497 (1913).

Purpose of legislature in adopting Civil Service Act was to remove employment in classified service from political control, partisanship, and personal favoritism, and to maintain stability and continuity in public employment, therefore it behooves the judicial branch of government to give widest possible range to application of law. Connor v City of Bayonne, 36 N.J. SUPER 390, 116A 2nd 48 (1955).

2) Conversely, is there anything in Civil Service Rules and Regulations that indicate supervision of Detectives by Investigators? 2A:157-4 reflects a provision for superior office ranks in the classified position of county detective? 2A:157-12 reflects *no* provision for superior officer ranks in the unclassified position of investigator. It would seem that the legislative intent in said Statutes is *clear*. Therefore, if the intent was to have unclassified personnel fill supervisory positions, would not said Statutes have so specified as is the case in the provision for supervisory personnel in the classified service for county detective, i.e., Chief of County Detectives, Deputy Chief of County Detectives, Captain of County Detectives, Lieutenant of County Detectives, Sergeant of County Detectives, all filled by competitive examination in accordance with the rules.

There is certainly ample precedent in those county prosecutor offices with classified Civil Service personnel in the Detective Bureau, that personnel filling a position in the unclassified service as a county investigator are subordinate to a county detective and above. Indeed, the section of the Union County Prosecutor's Office Rules and Regulations, under the subtitle "Chain of Command" for the Detective Bureau, reflects, in order, the Chief of County Detectives, a Captain of County Detectives, A Lieutenant of County Detectives, a Sergeant of County Detectives, a County Detective, a County Investigator. These Rules and Regulations are still in effect, although it is apparent they are not being adhered to. To pass a competitive examination and be appointed a county detective from a county investigator's position has always been a considered promotion.

3) I do not dispute the fact that the power of appointment to the position of county investigator is the exclusive prerogative of the Prosecutor. The facts and circumstances concerning his initial offer—which are set forth, in detail, in my 3/8/83 letter, form the basis of my initial complaint, and this appeal as well.

The facts are as follows:

As pointed out in said letter, I signed (based on the representations of the Prosecutor as set forth in the 3/6/83 letter), two previously prepared CS-6 forms on 11/29/82—one requesting a six month leave of absence from the classified service as a Lieutenant of County Detectives, effective 1/1/83 through 6/30/83, and the other requesting appointment as a Lieutenant of County Investigators in the unclassified service, effective 1/1/83. All the superior officers, at that time, did likewise—presenting the Prosecutor with an opportunity to make personnel moves without any

restrictions that might result from a question of classified personnel rights v unclassified personnel rights—supervisory questions, etc.

Said CS-6 forms were never executed by the Prosecutor. When he finally decided to make his personnel changes, he had those individuals who were given the opportunity, and accepted, his offer of rank in the unclassified service, sign new CS-6 forms reflecting the March 1983 date the changes were to take effect. As this did not include myself, I requested that the Prosecutor return the two (2) CS-6 forms that I had signed. This request was denied. The Prosecutor stated he would retain the forms, would not execute them, and gave me copies instead. These copies reflected that the original forms had been *altered* without my knowledge or consent.

I do not claim entitlement to receive an unclassified appointment, as alluded to by Mr. Ianni. I do claim that the arbitrary and capricious manner in which this situation has been handled by the Prosecutor violates the basic tenets of Civil Service law, and therefore my rights as well.

4) How could promotional rights have not been violated! The Prosecutor stated verbally and in writing, that regardless of any existing or future vacancies in the classified service, he would not call for any Civil Service competitive examinations during his tenure in office. *He* decided that Civil Service procedures were too slow, and not to his liking. Therefore, either take his proposal to sign off Civil Service and take your chance that he may appoint you to a supervisory position of questionable legality in the unclassified service, or stay where you are for his tenure in office.

The Prosecutor, when he announced his plans for the future, asserted that the approach he was taking had been approved by Civil Service. Inquiries

> to the Union County Personnel Office and the Department of Civil Service disclosed that right, up to the time of appointment they had no knowledge of what was going on.
>
> The Prosecutor appointed a Chief Investigator (?) from outside the office, after assuring all the superior officers, that he would not do so, should we relinquish our Civil Service classification.
>
> These, and other events of a duplicious nature leave little doubt that classified personnel have no place in Prosecutor Stamler's administration. Is this to be a return to the "Spoils System"? Is a total disregard of basic ethical considerations and existing law to be allowed?

In essence, Mr. Ianni's letter setting forth his conclusions, a) misconstrues the facts of the case, b) does not apply applicable law in reaching his determinations. The applicable nature of answers to Mr. Ianni's conclusions must be considered with reference to the facts and sequence of events reflected in my aforementioned letter of 3/8/83.

Please be advised that litigation pertaining to this matter is pending ajudication in superior court.

Thank you for your cooperation.

Very truly yours,

/s/ John N. Zamboni
Lieutenant of County Detectives

Enclosures

Letter dated 3/6/83—Lt. John N. Zamboni to Eugene J. McCaffrey, Sr.

Letter dated 8/9/83—Morris C. Ianni to Lt. John N. Zamboni

c Robert B. Blackman, Esq.
1997 State Highway # 27
Edison, New Jersey

In The Matter Of John N. Zamboni vs. Union County Prosecutor's Office	)	STATE OF NEW JERSEY CIVIL SERVICE COMMISSION
	)	Hearing Granted
	)	*ISSUED:* September 13, 1983

John N. Zamboni, Lieutenant of County Detectives, Union County, wrote to the Department of Civil Service concerning alleged irregularities and improprieties relative to the rights of classified employees occurring in the Union County Prosecutor's office. Mr. Zamboni submitted a memorandum from Prosecutor John H. Stamler to Captains, Lieutenants and Sergeants of County Detective in which the Prosecutor stated that he was going to promote Detectives (which is a classified title) to higher level Investigator titles (which are unclassified titles). In order to effectuate these promotions, the affected Detectives would be required to take leaves of absence from their classified titles for the period they served in the promotional position. The Prosecutor then proceeded to inform these individuals that if they chose not to go on leave and accept a promotion, they would remain in their existing title and at their salary and receive no advancement. Attached to the memorandum was a Personnel Action Form (CS-6) for the employee to execute if he was interested in a promotion. Additionally, Mr. Zamboni alleged that these policies were to avoid making appointments pursuant to Title 11, despite the Prosecutor's representations that these actions were being taken with the approval of

the Department of Civil Service in order to promote efficiency.

The record as presented raises serious concerns as to whether the promotional appointments made to the Investigator title series were done to avoid Civil Service procedures, in violation of the rights of tenured employees. In view of the numerous factual disputes, the Civil Service Commission directed that a hearing be granted for review of the allegations presented. The Commission further directed that the matter be transmitted to the Office of Administrative Law for an *expedited* hearing. The time and date for this hearing will be fixed later and the parties will be notified accordingly.

DECISION RENDERED BY THE CIVIL
SERVICE COMMISSION ON SEPTEMBER 8, 1983

/s/ Eugene J. McCaffrey, Sr.
Eugene J. McCaffrey, Sr.
President
Civil Service Commission

Inquiries
and
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c: John N. Zamboni
Prosecutor John H. Stamler
Captains Ballatt and Mason
Lieutenants Haines, Rowland, Rodman and Regal
Sergeants Lynch, Marranca and Connelly
Morris C. Ianni, Director of County and Municipal
Government Services